U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: June 7, 2000
Case No.: 1997-INA-487

In the Matter of:

JANET WELLS
Employer,

on behalf of:

ANA C. ALFARO-GAMEZ
Alien,

Appearances: Eli M. Kantor, Esq.
For Employer and Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, CA

Before: Burke, Rosenzweig and Vittone

JOAN HUDDY ROSENZWEIG
Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 6, 1995, Employer filed an application for labor certification to enable alien to fill the position of "Domestic Cook" (AF 64–65). The job duties to be performed were to "[p]repare meals

for family and prepare meals for parties and holidays. Serve, plan menus and cook meal. Prepare fancy dishes for parties, such as joojeh kabob, pilaf, chili rejjenos and abgoosht. Wash all dishes, pots and pans and discard spoiled food. Make list of required foods to be purchased by members of family." The required educational background was shown as grade school and high school, with two years experience as a domestic cook. The application listed the weekly basic number of hours as "40," with varying overtime. The hourly work schedule was shown as 9 a.m. to 6 p.m., with an hourly wage of $12.80 and an overtime pay rate of one and one–half times the hourly wage. The "Special Requirements" section of the form noted that it would be necessary for the individual to be able to work weekends and evenings, with prior notice given, at the overtime rate of pay. It would also be necessary that the individual be able to prepare meals for parties and holidays. With respect to recruitment efforts to hire a U.S. worker, the application noted, "Inquired among family members and associates–no response." The application was signed by Janet Wells, "Member of Household." (AF 64–65).

In a Notice of Findings dated March 13, 1996, the CO proposed to deny certification based on her assessment that there is "NO BONA FIDE JOB: JOB NOT CLEARLY FULL–TIME; EMPLOYER NOT CLEARLY ABLE TO PAY OFFERED WAGE." (AF 59). The CO noted that, while the application for labor certification ("ETA 750A") provided for a 40-hour work-week, cooking and performing related food preparation duties, the CO asserted that, "the employer has not shown that the job duties described constitute full–time employment in the context of the employer's household." (AF 59). Based on this analysis, the CO held that the employer's rebuttal "must establish conclusively that the job opportunity on the ETA 750A does in fact exist and that the employer has a job opportunity for a skilled worker." (*Emphasis in original*)(AF 60).

The CO also addressed the issues raised by 20 C.F.R. § 656.20(c)(1), that the employer possesses sufficient funds to pay the alien; and by 20 C.F.R. § 656.20(c)(4), that the employer will be able to place the alien on her payroll on or before the alien's proposed entrance into the United States. Noting that the employer has proposed an hourly wage of $12.80 for a 40–hour work–week, the CO extrapolated therefrom a weekly salary of $512.00, and a yearly salary of $26,624.00. Because the employer does not currently employ a domestic cook, the CO held that, "it is not clear that the employer is able to pay the offered wage[,]" and must therefore provide supporting documentation as to her financial capability in this regard (AF 60).

In light of the above, the CO provided for extensive corrective action, stating that the employer "must establish that the job offer meets the definition of 'employment' at 20 C.F.R. § 656.3 by providing **evidence** that establishes that the position as performed in the employer's household clearly constitutes full–time employment. Pursuant to 20 C.F.R. § 65620 (c)(1) and 656.20(c)(4), the employer must document that it is able to pay the offered wage."(*Emphasis in Original*)(AF 60).

In its Rebuttal, the employer provided substantially all of the data requested by the CO in the NOF. Thus, the employer's various W–2 forms and 1993 and 1994 tax returns reflect an aggregate household yearly income of between $250,000.00 and $300,000.00 (AF 33, 42–57).[1]

As part of its proof in response to the NOF, the employer noted that there are two adults and two children in the household. The children are 12 years old, and 2 ½ years old, respectively. There are three meals to be provided each day. The employer also stated that, as an executive, she must work once or twice each month, in the evenings. Both Wells and her husband entertain at home three to four times each month, and the submission reflects that the alien's work related to such entertaining would be compensated at the overtime rate of one and one–half the hourly rate. The employer provided an extensive list of the number of times they had entertained during the time designated in the NOF, including the reason for the party or dinner, the number of persons in attendance and thus, the number–and type–of meals served. With respect to the cook's duties for these meals, the alien would make a list of the items necessary to prepare the meals, cook the meals and "fancy dishes" and place them on platters to serve and would be responsible for washing the dishes and pots and pans. The employer would retain control over the actual purchasing of food and other related items.

With respect to the children, and because the employer and her husband each work full–time, as well as many instances of overtime, during the week and some Saturdays, the young child attends day–care from 9:00 a.m. until 12 noon, daily. The older child attends school all day and participates in after–school sports as a member of the volley ball team. The older child also studies ballet and attends art class once each week. When the parents are not at home, and because the alien would be fully occupied as a cook, the children are cared for by Felipa Escobar, who also performs housekeeping duties.

Subsequent to employer's Rebuttal, the CO issued a Final Determination on July 24, 1996, denying labor certification herein (AF 28–32). The first two pages of the Final Determination are "word–for–word" identical to the NOF.

Addressing the employer's rebuttal, the CO states that, "[t]he employer was advised that in order to correct the deficiency, it must establish that the job offer meets the definition of 'employment' at 20 C.F.R.§ 656.3 by providing **evidence** that establishes that the position as performed in the employer's household clearly constitutes full–time employment" and that the evidence submitted must consist of data to support each of the assertions. (*Emphasis in original*) (AF 30).

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[1] The designation, "household," subsumes the incomes of both Janet Wells–the named employer–and her husband, Stephen W. Kahane. Wells is employed as an "outside sales executive," while her husband is an engineer. Although employer's letter refers to the inclusion of a bank statement, the record does not so reflect. We nonetheless find that the financial documents submitted satisfy the requirements of the NOF in this regard.

Stating that all findings and corrective action requirements of the March 13, 1996 NOF were incorporated by reference, the CO offered the following bases for denial of labor certification:

> The information provided in the rebuttal is not convincing and does not show how the job duties could be full–time, taking the hours from 9:00 a.m. to 6:00 p.m. to perform. For instance, the length of time required to prepare each meal was not provided as requested in the NOF.

(AF 31).

By letter of August 23, 1996, the employer timely requested review of the Final Determination denying labor certification to the Board. (AF 1).

DISCUSSION

The Board has addressed many of the legal issues arising in cases such as the one herein, in which an employer seeks to engage a domestic cook–a skilled position–as opposed to general household workers, whose job duties are characterized as unskilled. *See* ***Carlos Uy III*** (March 3, 1999)(hereinafter "***Uy***"), and ***Daisy Schimoler***, 1997-INA-218 (March 3, 1999).

As in other similar cases involving labor certification for the position of "domestic cook," the NOF and Final Determination here state that while the application for certification provided for a 40–hour work week cooking and performing other related tasks[2], the CO herein also held that the employer failed to show that the job duties described constituted full–time employment within the context of the employer's household. The asserted violation in this regard was linked to 20 C.F.R. § 656.3, which defines "employment," in relevant part, as "permanent full–time work."

Most, if not all, of the detailed corrective action called for by the CO, falls within the parameters of the proof required to show whether or not a job is *bona fide*. Further, and equally important, the detailed response provided by the employer allows for the facts to be appropriately considered under a "totality of the circumstances" analysis, thereby enabling the Board to reach an appropriate conclusion herein. In this regard, the Board has held that an employer's treatment of an issue in its rebuttal may be one indication that the NOF provided adequate notice. *See* ***Anderson–Mraz Design***, 90-INA-142 (May 30, 1991).

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[2] The factual finding in this regard made by the CO herein in both the NOF and Final Determination is not entirely accurate, as the application and rebuttal further provide for substantial overtime work paid at time and one–half of the hourly wage.

We accordingly find that the employer was on notice that it would be required to prove that the job was *bona fide* and that the NOF, while not a model of clarity, was sufficient, under the circumstances discussed above, to enable us to reach the substantive issues herein without remanding the case for further development.

When considering whether a job is *bona fide*, a "totality of the circumstances" analysis is employed. Under the general rubric of this analysis, a review of the facts must be undertaken in two specific areas: what the alien brings to the table, so to speak, by way of education, experience and, if applicable, background; and for the employer's part, the nature, or type, of job being offered, including the general credibility of the position description. This would include whether the alien would be engaged in cooking duties for a substantial portion of the work day, the specific duties to be performed and, as a related matter, whether there are any job duties which the alien would be called upon to perform not specifically related to the domestic cook job description, such as child care or general housekeeping. In this regard, evidence of other domestic workers employed by the employer would be relevant. Additional employer-related issues are whether domestic cooks have been employed in the past, and whether the employer possesses sufficient income or assets to pay the alien's salary. Other issues to be considered which are not strictly substantive, are the employer's credibility, including its level of compliance and good faith in the processing of the application. Additional indicia are whether the position is being used to promote immigration, *i.e.*, whether the alien's work history shows any propensity to engage in domestic work; or, if she has cooking experience, is it of a nature that suggests specialized skill that an employer would be willing to hire her solely to cook. Other areas of inquiry are how the alien learned of the job offer and whether there is prior relationship between the employer and the alien or some other special connection. Also relevant to the "totality of the circumstances" analysis is whether there are any special household circumstances, including but not limited to nutritional requirements. *See* ***Uy***, *id.* at 11–16.

The record reflects that the alien had previously worked exclusively as a domestic cook for a period of more than two years in the household of Harriet Scharf. Scharf provided a letter to this effect, listing the various types of dishes prepared and the alien's duties. (AF102–103, and page 3, *supra*). The documentary evidence regarding the employer's income reflects a household aggregate yearly income of between $250,000.00 and $300,000.00. The alien's yearly salary calculated without overtime work, would be $26,624.00. Using the lower, $250,000.00 household income amount in the calculations, the alien's salary represents only 10% of the employer's yearly household aggregate income. Including overtime calculated at time and one-half, or $19.20 per hour, using the employer's expected entertaining schedule of three to four times each month, allowing for five hours of overtime for each occasion, results in an additional $4,600.00, or a yearly salary of $31,224.00. This higher figure still represents only 12% of the employer's yearly household aggregate income. We accordingly find the alien's salary, including overtime work, to be well within the employer's financial resources, and supports a finding that a *bona fide* job exists herein.

As required by the NOF, the employer stated that, in addition to the two adults, two children, ages 12 and two and one-half, live at home, and that three meals were to be provided each day. The employer also stated that the younger child attends morning day-care, from 9:00a.m. to 12:00p.m. each weekday. The older child attends school during the day, is a member of the school volley-ball team, studies ballet and also attends art class once each week.

As stated in the employer's submission, the children are cared for by Felipa Escobar, who also performs housekeeping duties at the employer's home. The submission notes that documentation in support of Escobar's employment as housekeeper and child care worker are not available as she does not possess a Social Security number and is paid in cash. The employer provided the CO with Escobar's telephone number so that she could be contacted. The record does not reflect that the CO attempted to confirm such employment.

The employer states that both parents work during the week, including frequent overtime work, and some Saturdays. Taking all of this into account, the employer's statement that the alien will have three meals to prepare each day is supported by the record. Thus, all family members eat breakfast, and the youngest child and Escobar would be present for lunch. On the days when the parents are home for supper, the entire family would eat that meal; and if the parents are not at home, then the children and Escobar will be eating an evening meal.

The employer also provided a list which reflected each time it had entertained during the calendar year immediately prior to the NOF. The list reflects the reason for the entertainment or party, the number of persons in attendance and the number and types of meals served. During that year, the employer had entertained on 16 occasions, never having present less than 10 guests. The employer often served as many guests as between twenty and fifty, and on two occasions, 60 guests were served.

The detail provided by the employer herein, allows us to make a determination that, given the degree and complexity of the employer's entertaining, as well as providing daily meals for the family–including all the preparation and cleanup that accompanies the providing of such meals– reflects a *bona fide* job within the meaning of the regulations. Given these particulars, including the entertaining, the employer's income, the fact that a housekeeper is already employed to perform childcare and cleaning duties, *inter alia*, we find that the relatively small number of daily meals to be prepared does not control herein, and that the job is *bona fide*.

Accordingly, the following order shall enter:

ORDER

IT IS HEREBY ORDERED that the Final Determination in the above–captioned case is **VACATED**, and the denial of labor certification **REVERSED**.

IT IS FURTHER ORDERED that the application for labor certification in the above-captioned case is hereby **GRANTED**.

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JOAN HUDDY ROSENZWEIG
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.